No. 83-368

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES A. RUSSO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a conspiracy between labor and management to reduce employees' wages through threats of economic loss made wholly outside the collective bargaining process may constitute a violation of the Hobbs Act, 18 U.S.C. 1951.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A40) is reported at 708 F.2d 209. The opinions of the district court (Pet. App. A50-A60, A61-A66) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1983. A petition for rehearing was denied on July 25, 1983 (Pet. App. A41-A42). The petition for a writ of certiorari was filed on September 3,

1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of violating, and conspiring to violate, the Hobbs Act, 18 U.S.C. 1951.[1] Each petitioner was sentenced to three years' imprisonment. In addition, petitioners Meli and Russo were fined $20,000 each, and petitioner Smith was fined $10,000. The court of appeals affirmed (Pet. App. A4-A40).

The evidence at trial is summarized in the court of appeals' opinion (Pet. App. A6-A9). It showed that petitioner Russo was the vice-president and treasurer of the J & J Cartage Company ("J & J") and owned 50% of the company's stock,[2] that petitioner Meli was J & J's labor "negotiator," and that petitioner Smith was a business agent of Local 299 of the International Brotherhood of Teamsters, which, at the times pertinent to this case, represented J & J's employees (*id.* at A6-A7). J & J employed approximately 40 truck drivers to haul steel from the Detroit waterfront to plants and warehouses in the Detroit area.

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[1] Petitioners were convicted at a second trial after their first trial ended in a mistrial due to the death of the presiding judge (Pet. App. A9). Joseph Cusmano, who was indicted along with petitioners, was convicted at a separate trial. Cusmano's conviction was reversed on the ground that the indictment was constructively amended at his trial. *United States* v. *Cusmano*, 659 F.2d 714 (6th Cir. 1981) (see Pet. App. A6 n.3 & A10-A11).

[2] Co-defendant Cusmano owned the other 50% of J & J's stock (Pet. App. A6 n.3).

Pursuant to collective bargaining agreements between J & J and Local 299, J & J was required to pay drivers who owned their own tractors and trailers ("owner-operators") at least 75% of the gross amount paid to the company for loads of steel hauled. The collective bargaining agreements also required J & J to contribute to the union's health and welfare fund and pension plan. A special rider to the agreements made it "unlawful and illegal" for the company's contributions to be deducted from the drivers' gross earnings. *Id.* at A7-A8.

In late 1971, Local 299 appointed two business agents, James Morisette and Donnes Deters, to investigate the status of drivers employed by cartage companies, including J & J, and to enforce the union membership and employer contribution provisions of the existing collective bargaining agreements. Through the efforts of these men, non-union drivers employed by J & J were added to the union rolls. C.A. App. 186a-193a, 737a-740a; 9 Tr. 235-242, 26 Tr. 168-171. Thereafter, in the spring of 1972, petitioner Meli, who previously had not been involved with J & J, met with Morisette and Deters and advised them that the principals of J & J were friends of his and that J & J should not be "unduly harassed" by the union. A short time later, Morisette and Deters were relieved of their duties, and petitioner Smith replaced them as the business agent for Local 299 at J & J. At about the same time, petitioner Meli was hired as J & J's labor negotiator. C.A. App. 133a-138a, 191a, 194a-198a; 4 Tr. 91-96, 9 Tr. 240, 249-253.

In late 1972, a drivers' "Grievance Committee" prepared a list of several ways in which they thought that J & J's drivers were being mistreated. The list

was given to J & J and petitioner Smith. Among other things, the drivers asked that J & J pay Social Security taxes and make contributions to the union's health and welfare fund and pension plan as required under the collective bargaining agreements. Pet. App. A8.

In response to the drivers' grievances, J & J held a general meeting of the drivers on November 26, 1972. At that meeting, petitioners Russo and Meli proposed that 15% be deducted from the drivers' gross earnings to cover the cost of their demands, but that proposal was voted down. At a second general meeting held several months later, J & J proposed to the drivers that the company would meet its obligations under the collective bargaining agreements in return for an 11% "service charge" to be deducted from the drivers' gross earnings.[3] The drivers overwhelmingly rejected this proposal as well. Pet. App. A8.[4]

Having failed to obtain the drivers' agreement to either proposal, co-defendant Cusmano called each of the drivers into his office individually and, "through promises, threats of economic loss, and misrepresentation," procured their signatures on a "supplementary agreement" providing for a 11% "serv-

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[3] Even before proposing the 11% "service charge" to the drivers, co-defendant Cusmano had told one employee that the drivers would continue to pay their own health and welfare and pension contributions "one way or the other" (C.A. App. 402a; 17 Tr. 9). In addition, over a month before the drivers voted to reject the 11% proposal, J & J had ordered, received, and paid for pre-printed lease agreement forms that incorporated the 11% "service charge" (C.A. App. 122a-124a, 1408a-1409a; 4 Tr. 40-42).

[4] A few drivers who earlier had been threatened with dismissal by co-defendant Cusmano voted for the 11% "service charge" proposal (C.A. App. 601a-603a; 23 Tr. 61-63).

ice charge" to be deducted from their gross earnings (Pet. App. A9).[5] Petitioner Meli had a reputation as being a part of the Mafia, and there was testimony at trial that this also was a factor in procuring the drivers' acquiescence to the 11% agreement (*ibid.*). Petitioner Smith cooperated with J & J by approving the supplementary agreement on behalf of Local 299 even though it directly contradicted the existing collective bargaining contracts. Moreover, Smith failed to follow the normal practice of filing the agreement with the Local and also failed to process the drivers' many grievances. Pet. App. A9; C.A. App. 167a-179a, 180a-182a; 6 Tr. 41-44, 7 Tr. 43-51, 94-96.[6] The

[5] Petitioners employed a variety of economic threats to persuade the drivers to sign the "supplementary agreement." Some drivers signed out of fear of reprisal through "spanking" by the company. J & J controlled the dispatching of drivers to the various loads it had contracted to haul, and some of these loads, because of the kind or quantity of steel involved or the time required to load or unload the steel, were unprofitable for drivers. Many of the drivers testified that a driver with whom the company was unhappy would be punished, or "spanked," by being given a disproportionate number of these "bad loads" or "dead loads." C.A. App. 225a, 348a-351a, 421a-422a, 572a, 609a, 709a, 734a-736a; 11 Tr. 30, 13 Tr. 244-247, 17 Tr. 65-66, 21 Tr. 108, 23 Tr. 75, 25 Tr. 55, 26 Tr. 70-72. Other drivers signed because they feared losing their jobs, and still others, who were buying their trucks from J & J (and whose trucks were titled in J & J's name), feared losing the money they had invested in the equipment. C.A. App. 497a-501a, 578a-581a, 582a-590a, 605a-606a, 622a-626a, 721a-723a, 726a-727a; 18 Tr. 111-115, 21 Tr. 157-160, 193-197, 23 Tr. 71-72, 179-183, 25 Tr. 232-234, 261-262.

[6] For example, driver Canter filed a grievance with Local 299 over the 11% deduction (C.A. App. 606-611a, 1438a; 23 Tr. 72-77). The grievance report, signed by petitioner Smith, indicates that a meeting was held at the company on December 19, 1973, and that the driver was absent and unavail-

11% "service charge" was deducted from the drivers' earnings for approximately a year; the deductions stopped shortly after a news reporter interviewed the president of Local 299 concerning alleged improprieties at J & J (C.A. App. 506a, 747a-752a; 26 Tr. 149, 189-192).

2. Prior to trial, petitioners moved to dismiss the indictment, alleging that it failed to state a crime under the Hobbs Act. Relying principally on *United States* v. *Enmons*, 410 U.S. 396 (1973), petitioners argued that Congress did not intend the Act to apply to "valid labor negotiations" and that the facts alleged in the indictment concerned the "legitimate renegotiation of an existing contract, necessitated by failing economic conditions or prompted by a desire for increased profits" (Pet. App. A51). Judge Gubow, to whom the case was then assigned, denied the motion. He reasoned that the facts alleged in the indictment revealed the absence of a legitimate management objective (Pet. App. A53):

> [I]f management and their negotiating agent conspired together with the union's negotiator to coerce the employees through extortion to pay Fund contributions which, pursuant to a valid collective bargaining agreement, were to be paid by the employer, the profits lose their legitimate status. * * * It is the alleged complicity of union and management to the detriment of the employees essentially muting their representative voice, which brings the present indictment within the purview of Hobbs, hence without the umbrella of *Enmons*. * * * The indictment which the court is here called upon to review alleges a

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able (C.A. App. 616a-618a; 23 Tr. 90-92). In fact, the driver had not been invited to the meeting (C.A. App. 612a; 23 Tr. 86). No further action was taken on the grievance.

> factual situation wherein there was no legitimate labor activity involved. The illegitimacy of the activity itself renders the benefits to be gained, *i.e.*, increased profits, illegitimate.

Following Judge Gubow's death, the case was reassigned to Judge Boyle. She allowed petitioners to renew their motion to dismiss the indictment but reached the same conclusion as had Judge Gubow (Pet. App. A65):

> The activity which the indictment charges, that is, a conspiracy between management and the union's negotiator to extort, by threat of economic loss, property to which the employees were lawfully entitled[,] is wrongful. If the conspiracy took place as the government alleges, then there was not legitimate labor-management activity.

3. The court of appeals affirmed (Pet. App. A4-A40). In the opinion for the court, Judge Brown noted that the 11% "service charge" was not achieved through collective bargaining; instead, it came about as a result of pressure exerted on the drivers individually (*id.* at A16). Under these circumstances, the court concluded that (*ibid.*):

> As we see it, the situation for purposes of the applicability of the Hobbs Act would not have been different had the drivers, as a result of threats of economic loss, been forced to take money out of their pockets and pay it to the Company to be used to satisfy the Company's legal obligation to the pension and welfare funds.

Judge Martin, who had authored the opinion in *United States* v. *Cusmano*, 659 F.2d 714 (6th Cir. 1981) (see page 2 note 1, *supra*), wrote a special

concurrence in which he noted that the panel in *Cusmano* had implicitly considered the issue raised by petitioners here and resolved it in the government's favor (Pet. App. A18). He also observed that the factor distinguishing both *Cusmano* and the present case from *Enmons* was petitioners' objective (*ibid.*):

> Here the employer, outside the collective bargaining context, attempted to obtain [by] wrongful means and under the guise of a "service charge" an objective which the parties' own contract specified would be "unlawful and illegal"—the shifting of responsibility for welfare and pension fund payments to the employees. It seems to me that under these circumstances *Enmons* is no bar to application of the [Hobbs] Act.

Finally, District Judge Holschuh, sitting by designation, wrote an opinion concurring only in the result, which he believed was compelled by the court of appeals' earlier decision in *Cusmano* (Pet. App. A20). In Judge Holschuh's view, however, the majority had wrongly interpreted the Hobbs Act as covering the activity alleged in the indictment, which he characterized as "an attempt by management to reduce its labor costs through a modification of a collective bargaining agreement" (*id.* at A29).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with this Court's decision in *Enmons* or with the decision of any other court. Accordingly, further review by this Court is unwarranted.

1. Petitioners argue (Pet. 7-11) that their conduct did not violate the Hobbs Act because their goal—to reduce J & J's labor costs and hence increase

company profits through a "mid-term modification" of the collective bargaining agreements—constituted a "legitimate management objective." In support of this contention, petitioners rely on *Enmons*, in which this Court held that union members' use of wrongful means—strike violence—to achieve a legitimate labor objective—higher wages as compensation for their work—does not violate the Hobbs Act. The Court explained in *Enmons* that the term "wrongful" as used in the Hobbs Act's definition of extortion (18 U.S.C. 1951(b)(2)) "limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property" (410 U.S. at 400).

In the present case, the court of appeals correctly concluded that petitioners' conduct was not directed at a legitimate objective within the meaning of *Enmons* (Pet. App. A16):

> In the instant case, the Company * * * had no legitimate claim to the "service charge" of 11% of the gross revenues. This is true because the existing contracts expressly required the Company to make the payments to the welfare and pension funds out of the Company's own funds. Indeed, the contract provided that it would be "unlawful and illegal" to deduct the welfare and pension payments from the owner-operator's gross earnings.

Enmons left undisturbed the application of the Hobbs Act to instances in which "unions used the proscribed means to exact 'wage' payments from employers in return for 'imposed, unwanted, superfluous and fictitous services' of workers" (410 U.S. at 400; footnote omitted). See, *e.g.*, *United States* v. *Green*,

350 U.S. 415 (1956); *United States* v. *Wilford*, 710 F.2d 439 (8th Cir. 1983), petition for cert. pending, No. 83-496; *United States* v. *Billingsley*, 474 F.2d 63 (6th Cir.), cert. denied, 414 U.S. 819 (1973). In those cases, as in the one at bar, the extortionate conduct was "wrongful" because it resulted in "property [being] misappropriated" (*Enmons*, 410 U.S. at 400). There is no rational distinction between forcing employers to pay for unwanted or fictitous services and forcing employees to forego the wages to which they are contractually entitled for work actually performed at the request of the employer; the two situations are simply opposite sides of the same illegal coin. Accordingly, *Enmons* does not support petitioners' argument.

2. In any event, *Enmons* has never been extended to situations falling outside of customary labor-management relations. The Court in *Enmons* relied heavily on legislative history of the Hobbs Act revealing a congressional intent to avoid policing the conduct of *strikes* (410 U.S. at 401-408, 411). Accordingly, *Enmons* has been accurately described as "a labor case dealing with the unique problem of strike violence," *United States* v. *Porcaro*, 648 F.2d 753, 760 (1st Cir. 1981), and, as the court below observed, limited to conduct in furtherance of "legitimate *labor* objectives" (Pet. App. A17; emphasis in original). See also *United States* v. *Zappola*, 677 F.2d 264, 269 (2d Cir. 1982), cert. denied, No. 82-297 (Oct. 4, 1982); *United States* v. *Cerilli*, 603 F.2d 415, 419 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Quinn*, 514 F.2d 1250, 1257 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976) (*Enmons* limited to "use of coercive tactics to obtain increased wages" in pursuit of "legitimate labor objectives").

Petitioners' attempt to characterize this case as an ordinary "labor case" is unavailing. Contrary to petitioners' claim (Pet. 11), their extortionate conduct was completely unrelated to "Collective Bargaining session[s]." Indeed, after petitioners were unsuccessful at general meetings in exacting the proposed "service charge" from J & J's employees, they eschewed collective bargaining altogether and resorted to threatening employees on an individual basis. As the court below noted (Pet. App. A16), the so-called "supplementary agreement" to shift the burden of making contributions to the union health and welfare fund and pension plan to the drivers "did not result from collective bargaining," but rather from a conspiracy between petitioners Russo and Meli and petitioner Smith, the union's own representative, to "pressure" individual drivers to accede to the company's "service charge" proposal. Thus, even if it were true, as petitioners argue (Pet. 10), that there is nothing wrong with management's seeking a "mid-term modification" of a collective bargaining agreement,[7] that would hardly legitimize the conspiracy in this case between management and the union's representative to force individual employees, completely outside the collective bargaining context, to relinquish earnings to which they were plainly entitled under the union contract.[8]

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[7] In his concurring opinion, Judge Holschuh acknowledged (Pet. App. A30) that the means employed by petitioners to "modify" the union contract "without question" constituted an unfair labor practice under Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d).

[8] Petitioners' argument (Pet. 11) that the decision below raises the spectre that "every businessman in this Country could find himself accused of extortion in violation of the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1983

Hobbs Act after any union bargaining session" is plainly refuted by the fact that the extortionate conduct in this case involved a conspiracy between management and the union's representative and took place completely outside the collective bargaining context.

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